LOO KHOO CHIN AND LOO AN MOOI & ANOR.

v.

TAN CHENG HANG & ORS.

HIGH COURT MALAYA, ALOR SETAR
MOHD. HISHAMUDIN MOHD. YUNUS J
[CIVIL SUIT NO. 268/81]
28 SEPTEMBER 1996

DAMAGES: *Fatal accident - 'Lost years' - Accident occurred before 1 October 1984 - Whether estate of deceased can claim damages for lost years under s. 8 of Civil Law Act 1956 (Rev. 1972) - Whether position is the same subsequent to amendment to the Act.*

DAMAGES: *Fatal accident - 'Lost years' - Whether general or special damages - Whether necessary to be specifically pleaded.*

DAMAGES: *Fatal accident - Claim against estate of deceased person - Whether claim must be instituted not later than six months after representation taken out - Section 8(3) Civil Law Act 1956.*

DAMAGES: *Fatal accident - Dependency claim - Beneficiary of estate and dependant of deceased one and the same person - Whether person is entitled to dependency claim in addition to estate claim - Difference in position before and after amendment - Section 7(3)(i)(d) of Civil Law (Amendment) Act 1975.*

TORT: *Negligence - Proof of negligence - Whether defendant must proffer reasonable explanation upon prima facie case of negligence being established.*

This was an action for damages as a result of a fatal road accident involving a lorry, a motorcycle and three cars. The motorcycle had encroached into the path of the oncoming lorry before both vehicles collided causing the lorry to lose control and in turn collide into a car wherein the first deceased and second deceased were travelling.

The first plaintiffs are the administrators of the estate of the first deceased while the second plaintiffs are the administrators of the estate of the second deceased. The first defendant is the lorry driver while the second defendant is his employer. The third defendant meanwhile, is the administrator of the estate of the motorcyclist who was killed in the accident. With regards the third defendant, the other defendants had applied for leave to issue a third party notice against the deceased motorcyclist's personal representative in her capacity as administrator about 3 years after representation had been taken out.

As the accident had occurred in 1978, that is before the coming into force of the Civil Law (Amendment) Act 1984 on 1 October 1984, the plaintiffs' claims are pursuant to the old law i.e. under the Civil Law Act 1956 (Rev. 1972) (Act 67) ("the Act"). The plaintiffs are, first, making an estate claim under s. 8 of the Act. Apart from the estate claim, there is also a dependency claim under s. 7 of the Act since the first deceased and the second deceased are husband and wife and they are survived by a child who was two years old at the time of the accident.

The evidence adduced by the defendants during the trial was not very illuminating. The pillion rider could not tell what happened as he stated that he fell unconscious after the accident and thereafter could not remember how the accident occurred. The lorry driver, meanwhile, merely stated that he applied the brakes to try and avoid the motorcycle but was unsuccessful and that as a consequence, the lorry swayed and collided with the motorcycle. However, he stated that, apart from this, he could not remember anything more as the incident had happened a long time ago.

In the event that negligence was established, Counsel for the defendants submitted that since there is no claim in the pleadings for the first and second deceased's loss of earnings (lost years), the claims for the benefit of their estates under s. 8 of the Act should be limited to their respective loss of expectation of life.

As the beneficiary of the estates of the first and second deceased and the dependant is one and the same, namely the child of the couple, the question arises as to whether the child is entitled to the dependency claim in addition to the estate claim. However, Counsel for the plaintiffs informed the Court that he concedes that there is a duplication of damages and thus, the dependency claim is not seriously pursued.

The question for the Court to determine is whether there was negligence on the part of the defendants thereby rendering them liable towards the first and second deceased. If this question is answered in the affirmative, the Court would naturally have to decide upon the issue of quantum of damages.

Held:

[1] By virtue of s. 8 of the Civil Law Act 1956, the estate of a deceased can claim for lost future earnings in the lost working years.

[2] The plaintiffs, apart from having succeeded in establishing a *prima facie* case of negligence on the part of the motorcyclist, have also succeeded in establishing a *prima facie* case of negligence against the lorry driver. Further, the Court finds that the defendants failed to negate any negligence

on their part. Therefore, on the facts, the Court finds that the lorry driver and the motorcyclist were joint tortfeasors guilty of the tort of negligence and 100% liable towards the first and second deceased.

[3] Once the plaintiff succeeds in establishing a *prima facie* case of negligence against the defendant, it is incumbent upon the defendant to give a reasonable explanation as to the cause of the accident so as to negate any negligence on his part.

[4] It is an established principle that loss of future earnings is treated as an item of general damages and thus it need not be specifically pleaded. It is sufficient if the plaintiff prays for general damages in his pleadings.

[5] The claim against the deceased motorcyclist is barred by s. 8(3)(b) of the Act which provides that proceedings against the estate of a deceased person must be instituted not later than six months after his personal representative took out representation. In this case there was a time lapse of more than six months and thus, despite the finding of guilt against the deceased motorcyclist, the plaintiffs' claims against his estate is dismissed.

Per curiam:

[1] After 1 October 1984, an estate cannot claim for lost future earnings in the lost working years. This follows from the amendment made to s. 8 of the Act by s. 3 of the Civil Law (Amendment) Act 1984.

[2] With regards the question as to whether the child is entitled to the dependency claim in addition to the estate claim, our Courts have always relied on the decision in *Davies v. Powell Duffryn Associated Collieries Ltd.* [1942] AC 601 where it was held that dependants must reduce their award by whatever amount they receive as beneficiaries of the estate. Be that as it may, with the coming into force in 1975 of the Civil Law (Amendment) Act 1975 (Act A308), and by applying a literal construction to s. 7(3)(i)(d) therein, any assessment of damages for the dependants should not take into account any sum received from the estate.

[Estate claim against first and second defendants allowed; Dependency claim disallowed; All claims against third defendant disallowed]

Cases referred to:

Thangavelu v. Chia Kok Bin [1981] 2 MLJ 277 ***(foll)***
Pickett v. British Rail Engineering Ltd. [1979] 1 All ER 774 ***(foll)***
Kandalla v. British Airways Board [1980] 1 All ER 341 ***(foll)***
Gammell v. Wilson & Ors. [1981] 1 All ER 578 ***(foll)***
Yap Ami v. Tan Hui Pang [1982] 2 MLJ 316 ***(foll)***
Indufela Co. v. Abdullah & Ors. [1976] 1 MLJ 93 ***(refd)***

Ngooi Ku Siong & Anor. v. Aidi Abdullah [1985] 1 MLJ 30 ***(foll)***
Tay Tong Chew & Anor. v. Abdul Rahman bin Hj. Ahmad [1985] 1 MLJ 50 ***(foll)***
Davies v. Powell Duffryn Associated Collieries Ltd. [1942] AC 601 ***(refd)***
Tan Chooi Thin v. Teo Whee Hong [1953] MLJ 203 ***(refd)***
Golam Hassan bin Muhamad v. Susila & Anor. [1987] 2 MLJ 211 ***(refd)***
Dewaramah a/p Ellapin, widow & beneficiary of Subramaniam a/l Kaliappan v. Ibrahim bin Abdul Jamid & Anor. [1989] 1 CLJ 18 ***(foll)***
Chua Kim Suan (Administratrix of the estate of Teoh Tek Lee, decd.) & Anor. v. Government of Malaysia & Anor. [1994] 1 MLJ 394 ***(foll)***

Legislation referred to:
Civil Law Act 1956 (Rev. 1972) (Act 67), ss. 7, 8
Civil Law (Amendment) Act 1975 Act A308
Civil Law (Amendment) Act 1984 (Act A602), s. 3
English Law Reform (Miscellaneous Provisions) Act 1934, s. 1(2)(c), 1(5)

For the plaintiffs - Saran Singh; M/s. Saran Singh & Co.
For the first and second defendants - R. Kandiah; M/s. Khoo & Sidhu
For the third defendant - Lim Ewe Hock; M/s. Lim Ewe Hock

JUDGMENT

Mohd. Hishamudin Mohd. Yunus J:

This action for damages by the plaintiffs arose from a tragic road accident that occurred on 14 December 1978. Five persons died in the accident that occurred at the 41st milestone along the Sungai Petani-Butterworth road. The accident involved a lorry, a motorcycle and three cars.

The first plaintiffs are claiming as administrators of the estate of Lu Yoon Poh, deceased (hereinafter referred to as "the first deceased") while the second plaintiffs are claiming as administrators of the estate of Ooi Siew Poh, deceased (hereinafter referred to as the "second deceased").

The first defendant was the driver of the lorry involved in the accident and the second defendant was his employer at the material time. The third defendant is the administrator of the estate of the motorcyclist who was killed in the accident.

As the accident occurred in 1978, that is to say, before the coming into force of the Civil Law (Amendment) Act 1984 (Act A602) on 1 October 1984, therefore, the plaintiffs are claiming under the old law, that is to say, the Civil Law Act 1956 (Rev. 1972) (Act 67) ('the Act') as it stood before 1 October 1984. They are claiming, first, under s. 8 of the Act. In essence, this section provides that if a tort is committed against a person and he dies, an action can be instituted against the tortfeasor by the deceased's personal representatives acting on behalf of his estate. The damages recovered will go

to the estate and from there they will be distributed as part of the inheritance of the beneficiaries. Section 8 reads:

Effect of death on certain causes of action.

8(1) Subject to this section, on death of any person all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:

Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to any claim for damages on the ground of adultery.

(2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person:

(a) shall not include any exemplary damages;

(b) in the case of a breach of promise to marry shall be limited to such damage, if any, to the estate of that person as flows from the breach of promise to marry, and

(c) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included.

(3) No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person, unless proceedings against him in respect of that cause of action either:

(a) were pending at the date of his death; or

(b) are taken not later than six months after his personal representative took out representation.

(4) Where damages has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this section, to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered.

(5) The rights conferred by this section for the benefit of the estate of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by s. 7 and so much of this section as relates to causes of action against the estates of deceased

persons shall apply in relation to causes of action under the said section as it applies in relation to other cause of action not expressly excepted from the operation of subsection (1).

(6) In the event of the insolvency of an estate against which proceedings are maintainable by virtue of this section, any liability in respect of the cause of action in respect of which the proceedings are maintainable shall be deemed to be a debt provable in the administration of the estate, notwithstanding that it is a demand in the nature of unliquidated damages arising otherwise than by a contract, promise or breach of trust.

It has been held by Sim JC in *Thangavelu v. Chia Kok Bin* [1981] 2 MLJ 277 that, by virtue of the above provision, the estate of a deceased can claim for lost future earnings in the lost working years. The learned Judge after comparing s. 8(2)(c) of the Act and s. 1(2)(c) of the English Law Reform (Miscellaneous Provisions) Act 1934; and persuaded by English authorities (*Pickett v. British Rail Engineering Ltd.* [1979] 1 All ER 774; *Kandalla v. British Airways Board* [1980] 1 All ER 341; and *Gammell v. Wilson & Ors.* [1981] 1 All ER 578), held:

> It is well settled law, therefore, that under our s. 8(2)(c) of the Civil Law Act 1956, which is in *pari materia* with s. 1(2)(c) of the English Law Reform (Miscellaneous Provisions) Act 1934, the plaintiff Thangavelu is entitled as administrator of the estate of his son to claim damages for the lost years of his son for the benefit of the said estate.

The right to recover lost earnings in the lost years by the estate was also affirmed by the Federal Court in *Yap Ami v. Tan Hui Pang* [1982] 2 MLJ 316. Suffian LP ruled (at p. 318):

> The contention here is that the instant case is a claim under s. 8 of our Ordinance, it is a claim for the benefit of the deceased's estate, that the deceased was injured by his fellow hunter the defendant, that if he had not died he would have had a cause of action to recover damages for loss of future earnings, as he had died this cause of action survived for the benefit of his estate and in this action the plaintiffs should be entitled to recover damages for loss of future earnings.
>
> While no House of Lords' decision is binding on us nevertheless it is of high persuasive value, and following Gammell [1982] AC 27, I am of the opinion that the plaintiffs **are** entitled to damages for loss of future earnings.

In passing and for the sake of completeness perhaps it is of some relevance if I should briefly just add here that after 1 October 1984, an estate cannot claim for lost future earnings in the lost working years. This follows from an amendment made to s. 8 of the Act by s. 3 of the Civil Law (Amendment) Act 1984 (Act A602). This amendment in effect, overruled *Thangavelu* and *Yap Ami* in respect to causes of action arising after 1 October 1984.

The first deceased and the second deceased are husband and wife and they are survived by a child, Lu Tze Chern, who was two years old at the time of the death of the couple. So, in addition to the above claim there is also a dependency claim under s. 7 of the Act. This section provides:

Compensation to the family of a person for loss occasioned by his death.

7(1) Whenever the death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to an offence under the Penal Code.

(2) Every such action shall be for the benefit of the wife, husband, parent, and child if any, of the person whose death has been so caused and shall be brought by and in the name of the executor of the person deceased.

(3) In every such action the Court may give such damages as it thinks fit proportioned to the loss resulting from the death to the parties respectively for whom and for whose benefit the action is brought.

Provided that:

(i) in assessing the damages there shall not be taken into account:

(a) any sum paid or payable on the death of the deceased under any contract of assurance or insurance, whether made before or after the coming into force of this Act;

(b) any sum payable, as a result of the death under any written law relating to employees provident fund;

(c) any pension or gratuity, which has been or will or may be paid as a result of the death; or

(d) any sum which has been or will or may be paid under any written law relating to the payment of any benefit or compensation whatsoever, in respect of the death; and (Emphasis added to denote that this proviso (d) was added in 1975 *vide* Civil Law (Amendment) Act 1975 Act A308.)

(ii) damages may be awarded in respect of the funeral expenses of the deceased person if such expenses have been incurred by the parties for whose benefit the action is brought.

(4) The amount so recovered after deducting all expenses, including the costs not recovered from the dependant, shall be divided amongst the before-

mentioned parties, or any of them in such shares as the Court by its judgment or decree directs.

(5) Not more than one action shall be brought for and in respect of the same subject matter of complaint, and every such action shall be brought within three years after the death of the person deceased.

(6) In any such action the executor of the deceased may insert a claim for and recover any pecuniary loss to the estate of the deceased occasioned by the wrongful act, neglect, or default, which sum when recovered shall be deemed part of the assets of the estate of the deceased.

(7) The plaint or writ or summons in any such action shall give full particulars of the person or persons for whom or on whose behalf the action is brought, and of the nature of the claim in respect of which damages are sought to be recovered.

(8) If there is no executor of the person deceased or there being an executor no action as in this section mentioned has, within six calendar months after the death of the deceased person, been brought by the executor, the action may be brought by all or any of the persons, if more than one, for whose benefit the action would have been brought if it had been brought by the executor, and every action so to be brought shall be for the benefit of the same person or persons and shall be subject to the same procedure as nearly as may be as if it was brought by the executor.

(9) It shall be sufficient for any dependant in any action brought under this section to pay any money, he is advised to pay into Court as a compensation, in one sum to all persons entitled under this section for his wrongful act, neglect or default without specifying the shares into which it is to be divided.

(10) If the sum is not accepted and an issue is taken by the plaintiff as to its sufficiency and the Court thinks the same sufficient, the dependant shall be entitled to judgment upon that issue.

(11) In this section unless the context otherwise requires:

'child' includes son, daughter, grandson, grand-daughter, stepson and stepdaughter;

'parent' includes father, mother, grandfather, grandmother;

'pension' includes a return of contributions and any payment of a lump sum in respect of a person's employment:

Provided that in deducing any relationship referred to in this subsection any illegitimate person or any person who has been adopted, or whose adoption has been registered, in accordance with any written law shall be treated as being or as having been the legitimate offspring of his mother and reputed father or, as the case may be, of his adopters.

The facts of the case, including the manner how the accident occurred, are not disputed. On that fateful day, one of the cars involved in the accident, PW6418, driven by the first deceased, was proceeding from Sungai Petani towards Butterworth on the said road. Also in the car was the second deceased, his mother in law, Teoh Ah Bee (PW3) and four other passengers. The traffic was quite heavy with vehicles travelling in both directions. At the said 41st milestone, a motorcycle, PAA 9859, ridden by one Hassim bin Bidi with a pillion rider, one Ghazali bin Abdul Hamid (DW4), overtook the car and encroached into the path of an oncoming lorry, AL7019, driven by the first defendant. The motorcycle collided with the motor lorry. The collision caused the motorcycle to be thrown on to the left side of the road (as one faces Butterworth) and to collide with another car, PW4196, driven by one Ang Hock Seng (DW1) which was travelling in the same direction as the motorcycle. After the collision, the lorry went out of control. It swerved to the right, encroached into the other lane and collided, first, with car PW1144 and then with car PW6418. When the first defendant saw the motorcycle encroached into his lane, he applied his brakes and tried to avoid the motorcycle but the lorry swayed and went out of control. At the material time the first defendant's lorry was fully loaded up to seven tons (the maximum weight permissible under the law for his lorry) with bottled drinks.

On the facts, it is my finding that the lorry driver (the first defendant) and the motorcyclist (Ghazali, deceased) were joint tortfeasors guilty of the tort of negligence and 100% liable towards the first and second deceased. They were the cause of the collision between the lorry and the two cars, PU1144 and PW6418. In my judgment, although the evidence shows that just before the collision between the lorry and the cars, the motorcycle had collided with the lorry, the motorcyclist cannot be said to be the sole cause of the subsequent collisions between the lorry and the two cars PU1144 and PW6418. Considering the circumstances as a whole, especially comparing the size of the motorcycle with that of the lorry and also the sketch plan evidence, in particular, such as the distance of 120 feet between F (the point of collision between lorry and the motorcycle) and Y (the spot where the lorry overturned and came to a standstill), and the fact that the lorry had encroached into the deceased's side of the road and collided with the deceased's car and overturned, it is my judgment that the plaintiffs, apart from having succeeded in proving a *prima facie* case of negligence on the part of the motorcyclist, have also succeeded in establishing a *prima facie* case of negligence against the lorry driver. For, in the absence of a satisfactory explanation to the contrary, it would be fair and reasonable to conclude that, regardless of the fact that there had been a prior collision between the motorcycle and the lorry, had the first defendant been driving with due care and attention, his lorry would not have gone out of control after the first collision and proceed forward to such a distance to

the other side of the road so as to collide with the two oncoming cars and to overturn at some distance away. Moreover, judging from the said distance of 120 feet (between F and Y), the extent of the damage to all the vehicles involved, particularly to the lorry, the amount of load it was carrying, and the fact that the lorry went out of control, swerved to the right, went to the other side of the road, and finally overturned, an inference can be drawn that the lorry was travelling at a speed which under the circumstances was unsafe.

In the present case, as the plaintiffs had succeeded in establishing a *prima facie* case of negligence against both the motorcyclist and the lorry driver (i.e. the first defendant), it was incumbent upon them to give a reasonable explanation as to the cause of the accident so as to negate any negligence on their part. (See *Indufela Co. v. Abdullah & Ors.* [1976] 1 MLJ 93). The motorcyclist was one of the five persons who died in the accident. However, the pillion rider DW4 testified for the defence. But his evidence was that he fell unconscious after the accident and could not remember how it occurred. As for the lorry driver, although he gave evidence, I find his evidence fell short of negating negligence on his part. He merely said that the motorcyclist in the course of overtaking a vehicle, had encroached into his lane; that he applied his brakes and tried to avoid the motorcycle but was unsuccessful; and that his lorry swayed and collided with the motorcycle. He was, however, not able to tell the Court as to what happened thereafter. He was not able to tell the Court at what speed he was travelling; whether his lorry overturned; whether his lorry collided with any vehicle; whether he was negotiating a bend; and as to the number of vehicles involved in the accident. The reason he gave for not being able to supply these details was that the incident took place a long time ago. In my judgment this is a lame excuse. It is clear to me that this witness who was never injured in the accident was only interested in telling the **partial** truth: he was not interested in telling the **whole** truth. Indeed, he was only interested in projecting the fault of the motorcyclist but only to that extent, and nothing more.

Therefore, I find the first defendant, the second defendant and the motorcyclist guilty of the tort of negligence against the first and second deceased. I am allowing the plaintiffs' claims against the first and second defendants under s. 8 of the Act with costs (the reason why I am not allowing the claim against the third defendant will be explained shortly).

Miss Kandiah, the learned Counsel for the first and second defendants, submitted that as there is no claim in the pleading for the first and second deceased's loss of earnings (lost years), the claims for the benefit of their estates under s. 8 of the Act should be limited to their respective loss of expectation of life. With respect, I find no merit in this argument. It is an established principle that loss of future earnings are treated as an item of

general damages, and need not be specially pleaded. This basic principle was reiterated by the Federal Court in *Ngooi Ku Siong & Anor. v. Aidi Abdullah* [1985] 1 MLJ 30, and *Tay Tong Chew & Anor. v. Abdul Rahman bin Hj. Ahmad* [1985] 1 MLJ 50. In the former case, the Federal Court (at p. 33-34) explained that loss of future earnings was part of general damages, and that:

> it was sufficient for the (plaintiff) to aver "And the plaintiff prays for judgment for: 1. General Damages", in his pleadings.

In the latter case, Mohamed Azmi FJ (as he then was) said (at p. 54):

> We would now consider the dispute on loss of future earnings. Since the case of *Low Ah Tow v. Yusof bin Kayab* [1954] MLJ 112 was decided by the Court of Appeal, loss of future earnings have always been regarded as general damages in this country. As such we do not agree with the argument of learned Counsel for the appellants that in order to succeed, such claim must be specifically pleaded. This point has been reaffirmed by the Court recently in *Ngooi Ku Siong & Anor. v. Aidi Abdullah* [1985] 1 MLJ 30.

In the instant case, general damages is pleaded in para. 11 (b) of the statement of amended claim as follows:

> 11. And the plaintiffs claim:
>
> a. Special damages ...
>
> b. General damages.

Although I find the deceased motorcyclist guilty of negligence against the first and second deceased, nonetheless, I am dismissing the plaintiffs claim against his estate (the third defendant) under ss. 8 and 7 with costs because the plaintiffs had instituted this action against his estate more than six months after his personal representative, Raihani bt. Hassan (the third defendant), took out representation. Raihani bt. Hassan obtained the letter of administration on 8 January 1980 whereas the application by the defendants for leave to issue a third party notice against her in her capacity as administrator was filed only on 16 December 1982 (see Encl. 15). By reason of this time lapse, the claim for the benefit of the first and second deceased's estates are barred by s. 8(3); and the claim for the benefit of their only surviving child, Lu Tze Chern - the sole dependant - is barred by s. 8(5) of the Act (in this latter situation, I am relying on the words "**... so much of this section (8) as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under the said section (7) ...**")

As the beneficiary of the estates of the first and second deceased and the dependant of the deceased couple is one and the same person, namely, Lu Tze Chern, the child of the couple, the question arises as to whether the child is also entitled to the dependency claim under s. 7 **in addition to** the benefit that he is getting as a sole beneficiary pursuant to the claim under s. 8? Our Courts have always answered this question by relying on the decision in *Davies v. Powell Duffryn Associated Collieries Ltd.* [1942] AC 601 (see e.g. *Tan Chooi Thin v. Teo Whee Hong* [1953] MLJ 203; and *Golam Hassan bin Muhamad v. Susila & Anor.* [1987] 2 MLJ 211). In that case, the House of Lords ruled that dependants must reduce their award by whatever amount they receive as beneficiaries of the estate. In so ruling, the House of Lords rejected the argument of the defendant (in *Davies*) who relied on s. 1(5) of the English Law Reform (Miscellaneous Provisions) Act 1934 (the Malaysia equivalent is s. 8(5)) which provides that the rights conferred by the Act for the estate of the deceased '**shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accident Acts**' (the Malaysian equivalent is s. 7 of the Act).

Be that as it may, to my mind, a difficult question of interpretation, however, is created with the coming into force in 1975 of the Civil Law (Amendment) Act 1975 (Act A308) (please refer to my emphasis when I referred to s. 7 earlier in this judgment). With this amendment, which introduced an additional proviso - proviso (i)(d) - to subsection (3) of s. 7, that subsection now provides that, in assessing the damages for dependants, there shall not be taken into account '**(d) any sum which has been or will or may be paid under any written law relating to the payment of any benefit or compensation whatsoever, in respect of the death**'. The problem here is that this proviso could be construed literally to mean that any assessment of damages for the dependants should not take into account any sum received from the estate (in other words, the amendment effectively reverses the rule in *Davies*). Is this the intention of the legislature?

In the present case, however, I believe that by reason of the fact that, in any case, based on arithmetical calculation, the damages recoverable under the dependency claim would be less than the damages recoverable under the estates' claims, Encik Saran Singh (Counsel for the plaintiffs) informs the Court that he concedes that there is duplication of damages and as such he is not seriously pursuing the dependency claim. In view of the stand taken by learned Counsel the dependency claim under s. 7 is, therefore, disallowed.

On the quantum, the first deceased was an officer of a company known as Mulpha International Trading Corp. Bhd. and was 34 years old at the time of death. He was earning a basic salary of RM630 per month, a special relief allowance of RM25 per month, and a fixed transport allowance of RM100

per month. His total monthly income therefore was RM755. However, guided by *Dewaramah a/p Ellapin, widow & beneficiary of Subramaniam a/l Kaliappan v. Ibrahim bin Abdul Jamid & Anor.* [1989] 1 CLJ 18 and *Chua Kim Suan (Administratrix of the estate of Teoh Tek Lee, decd) & Anor. v. Government of Malaysia & Anor.* [1994] 1 MLJ 394, I have made a deduction of 40% for the living expenses of the deceased.

The second deceased was a clerk with the same company and was 26 years of age at the time of death. She was earning a basic salary of RM350 per month and a special relief allowance of RM25 per month. Therefore her total monthly income was RM375. Just as in the case of the first deceased, I have made a deduction of 40% for living expenses.

Now, based on Exhibit P22 (I had ruled Exh. P27 as inadmissible) and the evidence of PW1, PW4 and PW5, I hold that the lost earnings of the first and second deceased and the other damages should be calculated as follows:

(A) Loss of earnings (lost years)

Lu Yoon Poh (first deceased) (34 years of age at the time of death)

Basic salary	...	RM630
Special Relief Allowance	...	RM 25
Fixed Transport Allowance	...	RM100
Total	...	RM755
Total after 40% deduction for living expenses	...	RM453

Multiplier = 55-34 = 21

= 21 divided 1/3 = 7

= 21-7 = 14

Loss of earnings according to the Annuity Table **RM53,453**

Ooi Siew Poh (deceased) (26 years of age at the time of death)

Basic salary	...	RM350
Special Relief Allowance	...	RM 25
Total	...	RM375
Total after 40% deduction for living expenses	...	RM225

Multiplier = 55-26 = 29

= 29 divided by 1/3 = 10

= 29 - 10 = 19

Loss of earnings according to the Annuity Table **RM32,630**

For both awards there shall be interest at the rate of 8% from the date of judgment until the date of payment.

(B) **Loss of expectation of life**

RM4,500 for each deceased. There shall be interest on this award at the rate of 6% to be calculated from the date of the service of the writ until the date of judgment; thereafter at 8% until the date of payment.

(C) **Funeral expenses**

RM3,000 for the joint funeral expenses. Interest is awarded at the rate of 3% to be calculated from the date of the accident until the date of the judgment; and at 8% thereafter until date of payment.

Reported by S. Dharmendran